Supreme Court, U.S.

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, COUNTY OF SAN BERNARDINO, CITY OF COLTON and CITY OF FONTANA,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR and MOLLIE BEATTIE, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH B. BLEY
(Counsel of Record)
COX, CASTLE & NICHOLSON LLP
2049 Century Park East
28th Floor
Los Angeles, California 90067
(310) 284-2231

[ADDITIONAL COUNSEL LISTED INSIDE FRONT COVER]

Washington, D.C. • THIEL PRESS • (202) 328-3286

29pp

MARY V. DICRESCENZO
THE NATIONAL ASSOCIATION OF
HOME BUILDERS OF THE
UNITED STATES
1201 - 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0250

THOMAS C. JACKSON
KELLEY DRYE & WARREN LLP
1200 - 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9662

Attorneys for Petitioners,
The National Association of Home Builders of the United States, The Building Industry Legal Defense Foundation, County of San Bernardino, City of Colton and City of Fontana.

QUESTION PRESENTED

Does the need for "biodiversity" and the possibility that benefits may some day flow from that biodiversity constitute a substantial effect on interstate commerce under the Commerce Clause so as to allow the federal government to protect the habitat of a fly, which is found only within an eight mile radius in the middle of southern California and which does not move among the states on its own or through human agency, through the criminal sanctions contained in the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in this Court are, and in the United States Court of Appeals for the District of Columbia were, the National Association of Home Builders of the United States, the Building Industry Legal Defense Foundation, the County of San Bernardino, California, the Cities of Colton and Fontana, California, Bruce Babbitt, Secretary of the Department of the Interior, and Mollie Beattie, Director of the United States Fish and Wildlife Service.

The National Association of Home Builders of the United States, a not-for-profit corporation, has neither a parent company nor any non-wholly owned subsidiaries.

The Building Industry Legal Defense Foundation, a not-for-profit corporation, is a wholly owned subsidiary of the Building Industry Association of southern California. The Building Industry Legal Defense Foundation has no subsidiaries.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 949 F.Supp. 1 (D.D.C. 1996). A copy of the opinion is set forth in Appendix A. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 130 F.3d 1041 (D.C. Cir. 1997). A copy of the opinion is set forth in Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered on December 5, 1997. No rehearing was sought.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Article I, § 8, cl. 3, of the United States Constitution states: "The Congress shall have power ... [t]o regulate commerce ... among the several states, ..."

Section 9(a)(1) of the Endangered Species Act, 16 U.S.C. § 1538(a)(1), states: " [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to ... (B) take any such species within the United States or the territorial sea of the United States; ..."

Section 3(19) of the Endangered Species Act, 16 U.S.C.

§ 1532(19), states: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Section 11(b)(1) of the Endangered Species Act, 16 U.S.C. § 1540(b)(1), states: "Any person who knowingly violates any provision of this chapter, ..., or of any regulation issued in order to implement subsection (a) (1) ... (B), ...of section 1528 of this title, shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both."

STATEMENT OF THE CASE

The plaintiffs filed their action in the District Court for the District of Columbia seeking a declaration that the application of § 9 of the Endangered Species Act (the "ESA") - which prohibits the "taking" (broadly defined) of endangered species - to the Delhi Sands Flower-loving Fly (the "Fly") exceeds the power of Congress under the Commerce Clause, and an injunction against its application to construction in areas containing the Fly's habitat. Jurisdiction was founded on 28 U.S.C. § 1331 and Section 11(c) of the ESA, 16 U.S.C. § 1540(c).

> "This dispute arose when the Fish and Wildlife Service ("FWS") placed the Fly, an insect that is native to the San Bernardino area of California, on the endangered species list. The listing of the Fly, the habitat of which is located entirely within an eight mile radius in southwestern San Bernardino County and northwestern Riverside County, California, forced San Bernardino County to

alter plans to construct a new hospital on a recently purchased site that the FWS had determined contained Fly habitat.[1] The FWS and San Bernardino County agreed on a plan that would allow the County to build a hospital and a power plant in the area designated as Fly habitat in return for modification of the construction plans and purchase and set aside of nearby land as Fly habitat. In November 1995, FWS issued a permit to allow construction of the power plant. During the same month, however, the County notified the FWS that it planned to redesign a nearby intersection to improve emergency vehicle access to the hospital. The FWS informed the County that expansion of the intersection as planned would likely lead to a 'taking' of the Fly in

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1 "The [FWS] has also impeded several localities from complying with County-mandated weed-control programs which are an integral part of preventing brush fires in the area. Construction planning and projects, including an electrical substation and housing developments, have also been threatened, impeded, or prohibited because of the Fly. Local land-use planning, including the authority to balance environmental concerns with development in a way to best serve citizens' interests, has been disrupted; the financial health of the local governments has been impacted; a local enterprise zone has been threatened; and private land development has been impeded." 130 F.3d at 1060 (Sentelle, J., dissenting).

> violation of ESA section 9(a). After brief, unsuccessful negotiations between the County and FWS, the County filed suit in district court challenging the application of section 9(a)(1) to the Fly.
>
> "The district court held that application of section 9(a)(1) of the Endangered Species Act to the Fly is a valid exercise of Congress' power pursuant to the Commerce Clause. Accordingly, the court entered summary judgment on behalf of the government." 130 F.3d at 1043.

The plaintiffs contended, both before the district court and the Court of Appeals, that the application of the taking prohibition contained in the Endangered Species Act to the Fly - inhabiting, as it does, a 40 square mile area in the middle of Southern California and lacking any economic significance whatsoever - was beyond the power granted to Congress under the Commerce Clause as interpreted by this Court in *United States v. Lopez*, 514 U.S. 549 (1995). Both courts rejected the argument and held in favor of the government.

REASONS FOR GRANTING CERTIORARI

Commentators quickly recognized that this Court's decision in *Lopez* could have a substantial impact on the application of legislation dealing with the regulation of the environment. *See, e.g.*, Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 Envtl. L.R. 10421, 10428 and 10429-

10430 (1995)(Endangered Species Act is vulnerable under *Lopez*); Holman, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139 (1995); Johnson, *United States v. Lopez: A Misstep, But Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. Envtl. L.J. 33, 42 (1996)(the success or failure of attacks on the Endangered Species Act and the Clean Water Act "depends heavily on whether *Lopez* is an aberration or the beginning of a trend moving away from the Court's traditional deferential Commerce Clause review"); and Warner, *The Potential Impact of the United States v. Lopez on Environmental Regulation*, 7 Duke Envtl. L. & Pol'y F. 321 (1997)(vulnerability of the application of the Endangered Species Act and the Clean Water Act in light of *Lopez*). As commentators often do, they argued both sides of the question without reaching any firm conclusions.

The case at bar arises in the context of federal environmental regulation but its implications go much beyond the Fly and its southern California habitat. It provides a vehicle for this Court to explain *Lopez* and its reach. The judges of the lower federal courts need this Court's guidance because they, like the commentators cited above, haven't been able to come to any consistent understanding of where the limits of Congress's Commerce Clause authority are, whether in the environmental realm or elsewhere. Put simply, they haven't the foggiest idea what this Court meant when it decided *Lopez*. There is disagreement between Courts of Appeals; there is disagreement between judges on individual panels of Courts of Appeals; and there is disagreement between the judges of the district courts and those of their Courts of Appeals.

Thumbnail descriptions of a number of cases will show just how widespread these disagreements are.

A. The Circuits Cannot Agree On The Meaning Of *Lopez*

1. The District of Columbia Circuit

The majority below held that the Commerce Clause provided Congress with the authority it needed in order to protect the Fly under the Endangered Species Act, notwithstanding the fact that it was found in an extremely limited area in the middle of one state. The majority held that the substantial effect on interstate commerce required under *Lopez* could be analyzed in terms of endangered species generally rather than with respect to the Fly specifically, *i.e.*, the majority never addressed Fly-specific issues which would demonstrate that the loss of the Fly (as opposed to any other endangered species) could have a substantial effect on interstate commerce. (130 F.3d at 1052-1055 (Wald, J.) and 1058-1059 (Henderson, J., concurring).)

2. The Fourth Circuit

In *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), the Court of Appeals held that the Army Corps of Engineers did not have authority under the Clean Water Act, 33 U.S.C. §§ 1311, *et seq.*, to regulate the draining and filling of isolated wetlands in light of *Lopez*, precisely in order to avoid a constitutional adjudication because this Court's "recent federalis`m jurisprudence" had drawn the extent of Congress's power to regulate isolated wetlands into question. (133 F.3d at 256.) The court noted that the

regulation purported to extend the reach of the Clean Water Act solely on the basis of activities which "could" affect interstate commerce. (*Id.*)

3. The Ninth Circuit

In *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), the Court of Appeals held that the government had failed to bear its burden under *Lopez* of showing that the burning down of a private residence had a substantial effect on interstate commerce and therefore reversed an arson conviction under 18 U.S.C. § 844(i). In doing so, the court stated that the determination of whether the effect on interstate commerce was substantial had to be evaluated on a case-by-case basis. (64 F.3d at 527.)

4. The Eleventh Circuit

In *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997), the Court of Appeals held that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601, *et seq.*, allowed criminal prosecution of a polluter even though the contamination "remains localized to Olin's site." (107 F.3d at 1508.) It was enough that the regulation of on-site hazardous waste disposal was part of a broader scheme "to protect interstate commerce and industries thereof from pollution." (107 F.3d at 1511.)

B. Circuit Judges Cannot Agree Between Themselves On The Meaning Of *Lopez*

1. The District of Columbia Circuit

The case at bar is a perfect example of the problems that the judges of the lower federal courts are having in

trying to understand just how they are to interpret the Commerce Clause in light of *Lopez*.

Two of the three Circuit Judges found that the application of the taking prohibition of the Endangered Species Act was justified under the Commerce Clause as interpreted by this Court in *Lopez*. (130 F.3d 1043-1057 (Wald, J.) and 1057-1060 (Henderson, J., concurring).) The remaining Circuit Judge dissented in light of *Lopez*. (130 F.3d at 1060-1067 (Sentelle, J., dissenting).)

All three of the judges in the Court of Appeals agreed that this Court had identified "three broad categories of activity that Congress may regulate under its commerce power." *Lopez, supra*, 514 U.S. at 558. Judges Wald and Sentelle agreed that the second category - the regulation and protection of the instrumentalities of interstate commerce or persons or things in interstate commerce - did not apply. (130 F.3d at 1046 (Wald, J.) and 1062 (Sentelle, J., dissenting).) Judge Henderson did not mention the second category in her concurring opinion. (130 F.3d at 1057-1060.) However, that was the end of their agreement.

Judge Wald held that the protection of the Fly was justified under the first category - regulation of the use of the channels of interstate commerce. (130 F.2d at 1046-1049.) Judges Henderson and Sentelle disagreed. (130 F.3d at 1057-1058 (Henderson, J., concurring) and 1062 (Sentelle, J., dissenting).)

Judges Wald and Henderson agreed that the protection of the Fly was justified under the third category - the regulation of activities having a substantial relation to interstate commerce. (130 F.3d at 1049-1057 (Wald, J.) and 1058-1060 (Henderson, J., concurring).) Judge Sentelle disagreed. (130 F.3d at 1063-1067.) However, Judges Wald and Henderson disagreed on the rationale behind the application of the third category. Judge Wald held that the possibility of commercial benefit in the future justified the application of the Endangered Species Act (130 F.3d at 1052-1054) and that the protection avoided destructive interstate competition. (130 F.3d at 1054-1057.) On the other hand, Judge Henderson held that the third category applied because "the loss of biodiversity by itself has a substantial effect on our ecosystem and likewise on interstate commerce." (130 F.3d at 1058 (footnote omitted).)

The case at bar does not stand alone; twelve different cases in five other federal circuits have resulted in split opinions when it comes to the application of *Lopez*.

2. The Third Circuit

In *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995), *reh'g en banc denied*, 73 F.3d 23 (3d Cir.), *cert. denied*, - U.S. -, 116 S.Ct. 681 (1995) the majority held that Congress had the authority under the Commerce Clause to enact 18 U.S.C. § 2119 to make carjacking a federal crime. Judge Becker dissented in light of *Lopez*. (66 F.3d at 590-603.)

3. The Fourth Circuit

In *Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 950 (4th Cir. 1997), the majority held that Congress had authority under the Commerce Clause to enact the Violence Against Women Act of 1994, 42 U.S.C. § 13981. Judge Luttig dissented in light of *Lopez*. (132 F.3d at 974-978.)

As noted above, the Court of Appeals held in *United States v. Wilson* that a federal regulation was invalid in its definition of what constituted "the waters of the United States" in order to avoid the necessity of questioning the authority of the Congress to regulate isolated wetlands under the Commerce Clause. Judge Luttig concurred only in the judgment because he felt bound by the court's decision in *Brzonkala*. (133 F.3d at 266.)

In *United States v. Davis*, 93 F.3d 141 (4th Cir. 1996), *cert. denied*, - U.S. -, 117 S.Ct. 1274 (1997), the Court of Appeals upheld the conviction of a defendant accused of fire bombing a house. Judge Doumar concurred but stated that federal jurisdiction was a close question under *Lopez*. (98 F.3d at 146-147.)

4. The Fifth Circuit

In *United States v. Hebert*, 131 F.3d 514 (5th Cir. 1997), the majority refused to even consider an attack on the Hobbs Act, 18 U.S.C. § 1951(a), on the ground that Congress had exceeded its authority under the Commerce Clause because of earlier decisions on the subject. Judge DeMoss dissented in light of *Lopez*. (131 F.3d at 528-530.)

In *United States v. Miles*, 122 F.3d 235 (5th Cir.), *reh'g en banc denied sub nom. U.S. v. Gustus*, 131 F.3d 142 (5th Cir. 1997), the Court of Appeals, in a per curiam decision, held that the Hobbs Act was constitutional both on its face and as applied. Judge DeMoss specially concurred on the ground that the court was bound by a prior decision of the court which had upheld the constitutionality of the Hobbs Act against an attack under *Lopez*. Nevertheless, he found himself "in such fundamental disagreement" that he felt the necessity of registering his contrary viewpoint. (122 F.3d at 241.)

In *United States v. Nguyen*, 117 F.3d 796 (5th Cir.), *cert. denied*, - U.S. -, 118 S.Ct. 455 (1997), the majority upheld the authority of Congress to make arson a federal crime under 18 U.S.C. § 844(i). Judge Jones dissented in light of *Lopez*. (117 F.3d at 798-800.)

In *United States v. Bailey*, 115 F.3d 1222 (5th Cir.), *reh'g en banc denied*, 127 F.3d 36 (5th Cir. 1997), *cert. denied*, - U.S. -, 118 S.Ct. 866 (1998), the majority held that Congress had the authority under the Commerce Clause to enact the Child Support Recovery Act, 18 U.S.C. § 228. Judge Smith dissented in light of *Lopez*. (115 F.3d at 1233-1240.)

In *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995), *reh'g en banc granted*, 78 F.3d 160 (5th Cir. 1996), *aff'd by an equally divided en banc court*, 105 F.3d 997 (5th Cir.), *cert. denied*, - U.S. -, 118 S.Ct. 47 (1997), the majority held that Congress had the authority under the Commerce Clause to make the possession of a machine gun a federal crime

under 18 U.S.C. § 922(o). Judge Jones, as a member of the panel which originally decided *Kirk*, dissented in light of *Lopez*. (70 F.3d at 798-802.) She was joined by Judges Garwood, Jolly, Smith, Barksdale, Garza and DeMoss when the matter was heard en banc. (105 F.3d at 1005-1013.)

5. The Sixth Circuit.

In *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996), the majority held that Congress had the authority under the Commerce Clause to make the possession of a machine gun a federal crime under 18 U.S.C. § 922(o). Judge Suhrheinrich dissented in light of *Lopez*. (91 F.3d at 787-788.)

In *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996), *cert. denied*, - U.S. -, 117 S.Ct. 2470 (1997), the Court of Appeals held that Congress had the authority under the Commerce Clause to make the possession of a gun by a convicted felon a federal crime under 18 U.S.C. § 922(g)(1). Judge Batchelder concurred on the ground that the court was bound by a prior decision of the court which had upheld the constitutionality of § 922(g)(1) against an attack under *Lopez*, even though he believed the court was wrong. (86 F.3d at 574-582.)

6. The Seventh Circuit.

In *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, - U.S. -, 117 S.Ct. 47 (1996), the majority held that Congress had the authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act, 18

U.S.C. § 248. Judge Coffey dissented in light of *Lopez*. (73 F.3d at 689.)

C. Courts Of Appeals And District Courts Cannot Agree On The Meaning Of *Lopez*

Ten cases in seven circuits have resulted in a Court of Appeals reversing a district court's application of *Lopez*.

1. The Third Circuit

In *United States v. Parker*, 108 F.3d 28 (3d Cir.), *cert. denied*, - U.S. -, 118 S.Ct. 111 (1997), the Court of Appeals reversed the district court, which had held that Congress had exceeded its powers under the Commerce Clause in enacting the Child Support Recovery Act of 1992, 18 U.S.C. § 228.

2. The Fourth Circuit

In *Brzonkala v. Virginia Polytechnic Institute and State University, supra*, the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting the Violence Against Women Act of 1994, 42 U.S.C. § 13981.

In *United States v. Wilson, supra*, the Court of Appeals reversed the district court, which had held in light of *Lopez* that the Corps of Engineers had not exceeded its authority under the Commerce Clause in regulating isolated wetlands.

In *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997), the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers

under the Commerce Clause in enacting the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248.

3. The Fifth Circuit

In *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997), the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting the Child Support Recovery Act, 18 U.S.C. § 228.

4. The Seventh Circuit

In *United States v. Wilson, supra*, the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248.

5. The Eighth Circuit

In *United States v. Wright*, 128 F.3d 1274 (8th Cir. 1987), the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting a portion of the Violence Against Women Act of 1994, 18 U.S.C. § 2262(a)(1).

6. The Ninth Circuit

In *United States v. Woodruff*, 122 F.3d 1185 (1997), *cert. denied*, - U.S. -, 118 S.Ct. 866 (1998), the Court of Appeals reversed the district court, which had granted a motion for acquittal in light of *Lopez* after a jury had convicted the defendant for a violation of the Hobbs Act, 18 U.S.C. § 1951(a).

In *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, - U.S. -, 117 S.Ct. 1567 (1997), the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting the Child Support Recovery Act of 1992, 18 U.S.C. § 228.

7. The Eleventh Circuit

In *United States v. Olin Corp.*, *supra*, the Court of Appeals reversed the district court, which had dismissed a complaint brought by the government under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9606(a) and 9607(a)(1)(A) and (2)(A), with respect to isolated contamination in light of *Lopez*.

CONCLUSION

Everyone needs guidance from this Court as to the reach of the Endangered Species Act in light of *Lopez*. Neither landowners nor local governments know when their activities will go too far and expose them to prosecution under the Endangered Species Act. Everyone - the lower federal courts, landowners, land regulators, and, not least, the federal governmental employees charged with applying the Endangered Species Act and enforcing its criminal penalties - needs and deserves this Court's guidance.

Is this Court's analysis in *Lopez* meaningful in terms of Commerce Clause jurisprudence or is it an "aberration,"

limited to guns near schools and the torching of single family homes? *United States v. Wilson, supra*, 133 F.3d at 266 (Luttig, J., concurring). Does *Lopez* have any application to environmental laws? Does Congress have the power under the Commerce Clause to regulate land use in isolated corners of the United States where the activities which form the basis for that regulation are limited to the sites involved?

More specifically, should this Court grant certiorari to determine the meaning of *Lopez* in the case of a fly found only in one state where the only basis for saying that there is a substantial effect on interstate commerce is the generalized hope that some benefits may flow from its continued existence at some unforeseeable time in the future?

To paraphrase Justice Thomas in his dissent from the denial of the petition for a writ of certiorari in *Cargill, Inc. v. United States*, - U.S. -, 116 S.Ct. 407, 409 (1995):

> "This case raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the [Endangered Species Act] that provides a compelling reason to grant certiorari in this case."

Respectfully submitted,

KENNETH B. BLEY*
COX, CASTLE, & NICHOLSON LLP
2049 Century Park East, 28th Fl.
Los Angeles, CA 90067
(310) 284-2231
**Counsel of Record*
Attorneys for Petitioners

Of Counsel:
MARY V. DICRESCENZO
THE NATIONAL ASSOCIATION OF HOME BUILDERS
OF THE UNITED STATES
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0250

THOMAS C. JACKSON
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600

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